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FILED

AUG 6 1983

ANDER L. STEVENS,
CLERK

**SUPREME COURT
OF THE UNITED STATES**

October Term, 1983

N83 - 252

DOMINIC BARTOLATTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARTHUR LEWIS
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Suite 802
Los Angeles, California 90012
(213) 624-4901
Attorney for Petitioner

(i)

QUESTIONS PRESENTED FOR REVIEW

1. Are authorizations for wiretap applications made by assistant Attorneys General in December and January, 1980, under a stale "special designation order" of a former Attorney General dated August, 1978, whose successor took office in August, 1979, violative of 18 USC § 2516.
2. Were wiretap orders obtained and utilized without normal investigative procedures having first been used and without a factual showing why normal investigative procedures could not have been utilized in this case?

CERTIFICATE AS TO INTERESTED PARTIES

UNITED STATES OF AMERICA,

vs.

DOMINIC BARTOLATTA

The undersigned, counsel of record for Dominic Bartolatta certifies that there are no known interested parties other than those participating in the case, which have been identified. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.

CHRIS PETTI aka CHRIS POULOS

ALFREDO GERARDO SICA aka FRED SICA

THOMAS PALMA

VINCENT MONTALTO

ARTHUR LEWIS
Attorney of Record for
DOMINIC BARTOLATTA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

DOMINIC BARTOLATTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Dominic Bartolatta petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PARTIES TO PROCEEDING

This proceeding originated in a criminal prosecution in the United States District Court for the Southern District of California wherein the United States of America was the plaintiff and the defendants were: CHRIS PETTI, ALFREDO GERARDO SICA, VINCENT MONTALTO, THOMAS PALMA and DOMINIC BARTOLATTA.

All defendants appealed from their convictions to the United States Court of Appeals for the Ninth Circuit.

The appeals were consolidated in the Court of Appeals (C.A. Nos. 82-1420, 82-1422, 82-1428, 82-1429).

Counsel for Petitioner is informed and believes that separate petitions for a writ of certiorari in this Honorable Court have been filed by CHRIS PETTI, ALFREDO GERARDO SICA, VINCENT MONTALTO, and THOMAS PALMA.

OFFICIAL AND UNOFFICIAL REPORTS

The disposition of the consolidated appeals in the United States Court of Appeals for the Ninth Circuit was by an unpublished memorandum filed and entered on April 22, 1983. A copy of this memorandum is reproduced as Appendix "A" hereto.

Petitioner did move the Court of Appeals for a rehearing which was denied. (Appendix "B".)

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the Southern District of California was based on a federal indictment charging Petitioners with conspiring to conduct, and conducting, an illegal gambling business in violation of 18 U.S.C. §§ 1955 and 371.

Jurisdiction of the Court of Appeals was based on Petitioners' timely appeals from their convictions under 28 U.S.C. § 1291.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STAY OF MANDATE

A motion for stay of the mandate was made to the Court of Appeals and opposed by Government. Said stay was denied (Appendix "C"). It is respectfully requested that this Court issue stay of mandate herein pending ruling

Petitioner Bartolatta has previously demonstrated that he will not flee or pose any danger to the community.

He remains on bond with a previously demonstrated solvent security.

He has submitted without incident or problem to the supervision of the Probation Office, and has satisfied all conditions of release since posting bond in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV of the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Petitioner also relies on the provisions of Title 18, United States Code, §§ 2515, 2516, and 2518, the provisions of which are set forth verbatim in Appendix "B" of co-petitioners' brief, concerning requirements for wire interception and interception of oral communications, as well as provisions prohibiting direct and derivative use of intercepted contents of communications.

STATEMENT OF THE CASE

Petitioner Bartolatta joins in the briefs of Petitioners Petti, Sica, and Montalto, heretofore filed under consolidated case numbers 82-1420, 82-1422, 82-1428, 82-1429

and incorporates the same herein by reference as though fully set out in the interest of judicial economy.

ARGUMENT FOR WRIT

Again Petitioner Bartolatta adopts and incorporates the argument of Co-Petitioners in their Petition for Writ of Certiorari and urges this Court to afford Petitioners the opportunity to review for the Court the large number of wiretap applications that are being issued contrary to this Court's mandate in **Giordano [United States v. Giordano, 40 L.Ed. 2d. 341 (1974)]**.

"Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced a clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious interception of wire and oral communications. **These procedures were not to be routinely employed as the initial step in criminal investigation.** Rather, the applicant must state and the court must find that normal investigative procedures had been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

(Citation omitted.)

Conclusionary language is finding its way into "boiler-plate" affidavits, particularly in gambling cases and the conclusionary language tracks the language of the statute so as to appear to or give the appearance of, complying with the statute. The affidavits are lengthy, and lost within them, are their apparent failure to comply with the statutory requirements of Title 18, § 2518(1)(c).

Respectfully submitted,

ARTHUR LEWIS
Attorney for Petitioner,
DOMINIC BARTOLATTA

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

vs.

DOMINIC BARTOLATTA,

Petitioner.

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court,
petitioner knows of no cases that are related to this ap-
peal.

DATED: July , 1983

ARTHUR LEWIS
Attorney for Petitioner
DOMINIC BARTOLATTA

APPENDIX "A"

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

*FILED
APR 22, 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
Plaintiff/Appellee,*

vs.

CHRIS PETTI,
Aka CHRIS POULOS,
ALFRED GERARDO SICA,
Aka FRED SICA,
VINCENT MONTALTO,
THOMAS PALMA, and
DOMINIC BARTOLATTA,
Aka DANNY,

Defendants/Appellants

Nos. 82-1420, 82-1421,
82-1422, 82-1428
82-1429
USDC NOS. CR-81-1037-1-LCN
CR81-1037-2-LCN
CR-81-1037-4-LCN
CR-81-1037-3-LCN
CR-81-1037-5-LCN

MEMORANDUM

Argued and Submitted: February 11, 1983

**Appeal from the United States District Court
for the Southern District of California
Honorable Leland C. Nielsen, Judge Presiding**

**Before: NELSON and NORRIS, Circuit Judges, and
SOLOMON,* District Judge**

Appellants Chris Petti, Alfred Sica, Vincent Montalto, Thomas Palma, and Dominic Bartolatta appeal from their convictions for conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 1371 and for conducting an illegal gambling business in violation of 18 U.S.C. § 1955.

Appellants' arguments on appeal are without merit; we therefore affirm.

The district court did not err in determining that the government had made adequate showings of "necessity" to support the San Diego, Las Vegas, and Los Angeles

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

wiretaps.¹ Each of the affidavits contained particularized and detailed information to show that normal investigative methods had been tried and failed and were reasonably unlikely to succeed in the future or would be too dangerous. 18 U.S.C. § 2518(1)(c), (3)(c).

The San Diego and Los Angeles wiretap authorizations were valid. Under the doctrine of administrative continuity, the designations of authority made by Attorney General Bell continued in effect after the expiration of his term. See **In re Weir**, 520 F.2d 662 (9th Cir. 1975); **United States v. Morton Salt Co.**, 216 F. Supp. 250, 256 (D. Minn. 1962), aff'd, 382 U.S. 44 (1965)(per curiam).

All of the other arguments raised by appellants Palma and Bartolatta are without merit.

We therefore affirm the district court.

AFFIRMED.

1) Appellant Palma has standing to challenge the Los Angeles wiretap only. See **Alderman v. United States**, 394 U.S. 165, 176 (1968) (an individual whose conversations were intercepted has standing to assert the illegality of a wiretap order). Appellant Bartolatta has standing to challenge the San Diego wiretap because of his proprietary interest in the premises where the tapped conversations took place. See *id.* (an individual has standing to assert illegality of wiretap if conversations occurred on his premises).

APPENDIX "B"

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 82-1429

D.C. No. CR-81-1037-5-LCN

ORDER

FILED
JUN 20, 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DOMINIC BARTOLATTA,
aka DANNY,

Defendant-Appellant.

Before: NELSON and NORRIS, Circuit Judges, and SOL OMON*, District Judge.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX "C"
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 82-1429

FILED

D.C. No. CR-81-1037-5-LCN JUL 18, 1983
ORDER PHILLIP B. WINBERRY
UNITED STATES OF AMERICA,
Clerk, U.S. Court of Appeals

Plaintiff-Appellee,

vs.

DOMINIC BARTOLATTA,
aka DANNY,

Defendant-Appellant.

Before: NELSON and NORRIS, Circuit Judges, and
SOLOMON,* District Judge

Appellant's Motion for Stay of Mandate Pending Ap-
plication for Certiorari is denied.

*The Honorable Gus J. Solomon, Senior United States District Judge
for the District of Oregon, sitting by designation.

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On , 1983, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of five (5) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Robert D. Rose Assistant US Attorney U.S. Courthouse 940 Front St. Room 5-N-19 San Diego, CA 92189	Harrison W. Hertzberg, Esq. 3550 Wilshire Blvd. Los Angeles, CA 90010 Victor S. Eriksen, Esq. 1067 Front St. San Diego, CA 92101
---	---

REX LEE

Solicitor General of the United States
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520 S. Fourth St.
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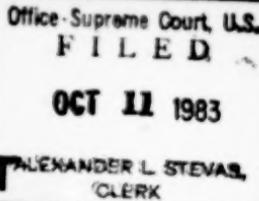
I certify under penalty of perjury that the foregoing is
true and correct.

EXECUTED on , 1983, at Riverside, California.

JACK GALLAGHER

SEE COMPANION CASE

83 - 252



**SUPREME COURT
OF THE UNITED STATES**

October Term, 1983

No. _____

DOMINIC BARTOLATTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

**RESPONSE TO MEMORANDUM
OF THE UNITED STATES IN OPPOSITION
TO PETITION FOR CERTIORARI**

ARTHUR LEWIS
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Suite 802
Los Angeles, California 90012
(213) 624-4901
Attorney for Petitioner

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Nos. 82-2092 and 83-252

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1983

CHRIS PETTI, ET AL.

v.

UNITED STATES OF AMERICA

DOMINIC PARTOLATTA, PETITIONER

v.

UNITED STATES OF AMERICA

**RESPONSE TO MEMORANDUM
OF THE UNITED STATES IN OPPOSITION
TO PETITION FOR CERTIORARI**

The Government incorrectly states the contention of the petitioners herein as:

"The affidavit supporting the application for the initial interception inadequately demonstrated that other investigatory techniques were inef-

fective." (Memorandum of the United States in Opposition, page 1)

And again at page 4 of said memorandum:

"3. Petitioners also contend (Pet. 9-11) that the affidavit failed to comply with 18 U.S.C. 2518(1)(c), arguing that insufficient facts were alleged to show that other investigative procedures could not have been successfully utilized. The court below properly rejected this claim."

The foregoing was not the argument of petitioners in the court below. Appellant's opening brief¹ cited the statement of the issue as being:

"DOES THE AFFIDAVIT IN SUPPORT OF THE ORDER OF DECEMBER 23, 1980 AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS IN THE INSTANT CASE SATISFY THE 'NECESSITY' REQUIREMENTS OF 18 USC SECTION 2518(1)(c) AND 18 USC SECTION 2518(3)(c)?"

1. A copy of appellant's Opening Brief and Reply Brief are being lodged with the Clerk of the Court.

And in his Reply Brief (page 7), appellant Bartolatta argued:

"Appellants herein do not complain that the affidavit should fail because the government has not exhausted all techniques. Appellants complain that the affidavit is devoid of facts so that

the district court judge would have a basis for determining whether it comports with the requirements of **U.S. v. Giordano**, 40 L.Ed.2d 341 (1974), **U.S. v. Kalustian**, 529 F2d 585, 588 (9th Cir. 1976), and **U.S. v. Spagnuolo, supra.**"

Petitioners point out as they did in the court below that the affidavit in the instant case makes reference (page 4 thereof, paragraph c line 15):

"Normal investigative procedures have been tried and have failed, appear unlikely to succeed if tried or too dangerous if tried. These investigative procedures will be detailed further herein."

While the foregoing paragraph tracks the language of the statute, a detailed reading of the 64 page affidavit fails to set forth the investigative procedures that were in fact employed in the instant case.

A reading of the affidavit lists "boilerplate" paragraphs describing bookmaking in general and the District Court Judge was given no information pertaining to **this bookmaking operation** but only to bookmaking in general.

The affidavit fails to indicate when the investigation commenced and merely recites the receipt by the affiant of information from various sources and files. Nothing in the affidavit indicates that these sources were contacted or caused to be contacted by the affiant in the course of this investigation or whether the sources reported routinely in the course of their roles as informants or was culled from

information already in the Government's files.

Petitioners herein do not quarrel with the statement of probable cause, but 2518(1)(c) and (3)(c) require a specific factual showing set forth in the affidavit that "wiretapping is required because normal investigative techniques were tried and failed (or were too dangerous)."

Under "need for interception", after reciting that one or more of the informants were "fearful" and would not testify in open court the affidavit states that:

"None of the informants is able to furnish information which would fully identify all members of the ongoing criminal conspiracy. . ."

The affidavit concludes with the statement that based upon the experience of the affiant and other special agents interviews would not normally (emphasis added) be successful. Also recited was the affiant's meeting with the United States Attorney who advises that "based upon his experience" prosecuting criminal violations of federal law, he advised affiant that the Federal Grand Jury investigation would probably (emphasis added) not be successful in achieving the above mentioned goals because (a) subjects of the investigation, should they be called to testify, would most likely (emphasis added) invoke Fifth Amendment privileges; and (b) it would be unwise to seek Grand Jury immunity for any of the subjects named herein as it might (emphasis added) foreclose prosecution of the most culpable persons.

The affidavit further recites that surveillance rarely

(emphasis added) succeeds in gathering evidence of the criminal activities under investigation and as the Government mentions in its brief in opposition to petition for certiorari (page 6 footnote 6:)

"Even more specifically, the affidavit indicated that petitioner Petti was extremely cautious and monitored his surroundings carefully (Aff. 55)."

The affidavit merely recited the following in this regard:

"...that he is extremely cautious and alert for law enforcement activity. He has said that he closely monitors his automobile mirrors and frequently looks out of his windows, both at home and at work, to determine if there are any suspicious persons or vehicles in the area."

It should be noted that the foregoing paragraph concerning the extreme caution of petitioner Petti was not even an observation of the investigative agency or corroborated by them but merely information from a confidential source that Petti's caution extends to monitoring his automobile mirror and looking out of his windows both at home and at work to determine whether suspicious persons or vehicles were in the area.

It is inconceivable that this minimal exercise of caution could deter the investigative and law enforcement agencies in their prescribed duty investigating criminal activity and hence require a wiretap.

The allegation by the affiant as to the need for interception contains standard boilerplate reasons to attempt to

justify issuance of the wiretap order in this bookmaking case. The affidavit does not set forth what the investigative procedures were although in the introductory paragraph (page 4 paragraph c line 15) the affiant states "these investigative procedures will be detailed further herein."

A review of the affidavit reflects the collection of telephone toll records, telephone company business records, information from informants and at best, only minimal surveillance.

A reading of the affidavit reflects that the affiant anticipated the bookmaking investigation would not be successful without the wiretap and this appears from the statements in the "need for intercept."

The affiant's lack of success in past cases and lack of probability of success in using other grand juries or other investigations is set forth but what is not set forth is the investigations that were in fact, in good faith, attempted in this particular case and why in this particular case such normal investigative techniques were not likely to succeed as is required by the statute.

The mandate against "boilerplate" affidavits was set forth in **People v. Kerrigan**, 514 F.2d 35 (1975 9th Cir.) and **United States v. Feldman**, 535 F2d 1175 (9th Cir. 1976) and although those affidavits were upheld, those affidavits set forth some of the factual difficulties inherent in those particular cases.

In the instant case the district court judge could not, from a reading of the affidavit, determine when the invest-

igation commenced, what initial steps were taken in connection with the investigation, which persons were attempted to be surveilled, how many attempts at surveillance were made over what period of time, or **how long** any one surveillance was continued.

It is apparent that in gambling cases, a wiretap makes the case and that agents, knowing this, spend more time in preparation of the affidavit setting forth why **normal** investigations **do not** succeed than in conducting the investigation itself.

While it is true as the Government has alleged that "every investigative technique need **not** be employed," clearly there is a requirement that **some** "normal" investigation be conducted and the results thereof set forth so that the magistrate (district court judge) can determine for himself that, as the court said in **United States v. Spagnuolo**, 549 F2d 705, (at page 710):

"What is required is a showing that in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time."

"Any such showing requires setting forth an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine, **independently of an agent's assertions with respect to his or other agents' experiences,**

that ordinary investigative techniques will very likely not succeed or that their use will impair a life or in some other specific way be too dangerous." (Emphasis added.)

And at page 710:

"It is no doubt true that experienced agents at the outset of an investigation can anticipate with a fair degree of accuracy whether ordinary techniques will fail or prove to be 'too dangerous'. To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents as a waste of time and resources. Their perception may be accurate, but Congress has deprived it of decisive influence. The particularized showing here described is necessary. A district judge, not the agents, must determine whether the command of Congress has been obeyed."

What is in issue here is whether or not this court will insist that 2518(1)(c), (3)(c) are to be followed or whether the Government will be permitted to secure a wiretap on a minimal investigation without any detailed showing of the extent of the investigation attempted or employed, and with a recitation of their past experience in investigations of this kind without any showing of how the operation being conducted herein, is different from ordinary book-

making cases that do not and would not lend themselves to normal investigations.

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

ARTHUR LEWIS
Attorney for Petitioner,
DOMINIC BARTOLATTA

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On October 6, 1983, I served the within RESPONSE TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk of the Superior Court OSCAR GOODMAN
County of Los Angeles 520 S. Fourth St.
111 North Hill Street Las Vegas, Nevada 89101
Los Angeles, California 90012

REX LEE

Solicitor General of the United States
Department of Justice
Room 5143
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 6, 1983, at Riverside, California.

JACK GALLAGHER